

Decision **PROPOSED DECISION OF ALJ COLBERT** (Mailed 9/21/2012)

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

In the Matter of the Application of  
San Francisco Deluxe Sightseeing, LLC for  
Passenger Stage Authority under Pub.  
Util. Code Section 1031 et seq. to transport  
passengers and their baggage on a  
regularly scheduled basis between various  
points in the City and County of  
San Francisco, and various points in the  
County of Marin; and to establish a Zone  
of Rate Freedom under Pub. Util. Code  
Section 454.2 et seq.

Application 10-08-025  
(Filed August 30, 2010)

And Related Matters.

Application 10-09-005  
Application 10-10-008

**DECISION DENYING PROTESTS OF OPEN TOP SIGHTSEEING  
SAN FRANCISCO AND GRANTING CERTIFICATES OF PUBLIC  
CONVENIENCE AND NECESSITY TO OPERATE AS PASSENGER STAGE  
CORPORATIONS AND ESTABLISHING ZONES OF RATE FREEDOM FOR  
SAN FRANCISCO DELUXE SIGHTSEEING, LLC,  
CITYSIGHTSEEING CORPORATION, AND SF NAVIGATOUR, INC.**

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**DECISION DENYING PROTESTS OF OPEN TOP SIGHTSEEING  
SAN FRANCISCO AND GRANTING CERTIFICATES OF PUBLIC  
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CITYSIGHTSEEING CORPORATION, AND SF NAVIGATOUR, INC.**

**Summary**

This decision denies Open Top San Francisco, Inc.'s protests and grants to CitySightseeing Corporation, SF Navigatour, Inc., and San Francisco Deluxe Sightseeing, LLC, Certificates of Public Convenience and Necessity to operate as Passenger Stage Corporations pursuant to Pub. Util. Code §§ 1031 et seq., and to establish Zones of Rate Freedom for all pursuant to Pub. Util. Code § 454.2.

This proceeding is closed.

**1. Factual and Procedural Background**

There are three separate Applicants in this consolidated proceeding; all three operate tour buses in the City and County of San Francisco (San Francisco or City) and surrounding counties. CitySightseeing Corporation<sup>1</sup> (CitySightseeing) is a Delaware company, based in San Francisco, at 2800 Leavenworth Street, #14. SF Navigatour, Inc.,<sup>2</sup> d/b/a Super Sightseeing Tours (Super Sightseeing) is a California corporation based in San Francisco at 2627 Taylor Street. San Francisco Deluxe Sightseeing, LLC<sup>3</sup> (Deluxe Sightseeing), is a California Limited Liability Company (LLC) based in Millbrae at 88 South

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<sup>1</sup> CitySightseeing, Application (A.) 10-10-008, filed their application on October 12, 2010.

<sup>2</sup> Super Sightseeing, A.10-09-005, filed their application on September 3, 2010.

<sup>3</sup> Deluxe Sightseeing, A.10-08-025, filed their application on August 30, 2010.

Broadway, Suite 2107. All three Applicants currently hold Class-A Charter Party Certificates (TCP-As). CitySightseeing, Super Sightseeing and Deluxe Sightseeing will collectively be referred to as Applicants.

All three Applicants seek a Certificate of Public Convenience and Necessity (CPCN) to operate as a Passenger Stage Corporation (PSC) under Pub. Util. Code<sup>4</sup> § 1031 and to establish a Zone of Rate Freedom (ZORF) under § 454.2 of the Code within their respective counties of operation. CitySightseeing and Deluxe Sightseeing plan to operate within San Francisco and Marin counties. Super Sightseeing plans to operate within San Francisco, Marin and Alameda counties.

Applicants state that they have received requests from passengers on their round-trip rides to spend more time at a certain point of interest and then return to the point of origin on a later bus. As a result, Applicants' proposed service provides passengers the ability to "hop-on" and "hop-off" Applicants' buses at any of the many stops along their routes. Under their current TCP-A, they may only operate a round-trip sightseeing service.

Open Top Sightseeing San Francisco, LLC (Open Top), a Delaware LLC, filed protests in opposition to all three Applications.<sup>5</sup> Open Top is a competitor of the Applicants and currently holds a CPCN to operate as a PSC. It operates a "hop-on" and "hop-off" service. The instant Applications were filed in response to "Cease and Desist" letters sent by Open Top to the Applicants.<sup>6</sup> The central

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<sup>4</sup> All references to "Code" are to the California Public Utilities Code.

<sup>5</sup> On October 4, 2010, Open Top filed a protest of Deluxe Sightseeing's Application. On October 14, 2010, Open Top filed a protest of Super Sightseeing's Application. On November 15, 2010, Open Top filed a protest of CitySightseeing's Application.

<sup>6</sup> Prehearing Conference (PHC) Transcript 19: 16-26, 50: 1-10.

claim of the protests was that the Applicants are already providing a kind of “hop-on” and “hop-off ” service without appropriate authority.<sup>7</sup> Open Top argued that Applicants’ current operations are improper and the Commission should not condone nor reward Applicants’ illegal behavior by approving the CPCNs sought by the Applicants.<sup>8</sup> Open Top also argued that the three Applicants failed to meet the financial and evidentiary standards required in a CPCN Application as set out in Code § 1032.

San Francisco, acting through its Municipal Transportation Agency (SFMTA), filed a response as an interested party to the three Applications.<sup>9</sup> SFMTA reported that there has been a substantial increase in the number of sightseeing buses operating in San Francisco in recent years. As a result of tour bus operators failing to comply with City laws, including parking and passenger loading restrictions and restrictions on soliciting customers from vehicles, San Francisco has experienced increased traffic congestion in the downtown and key tourist areas. The City requested that any CPCN granted in this matter specify that the Applicant comply with applicable local laws governing parking and stopping, passenger loading, solicitation and excessive engine idling.

The Commission’s Consumer Protection and Safety Division has not protested the Applications.<sup>10</sup>

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<sup>7</sup> PHC Transcript 35: 22-28.

<sup>8</sup> PHC Transcript 31: 16-26.

<sup>9</sup> *Response of the City and County of San Francisco to Application No. 10-08-025*, October 26, 2010.

<sup>10</sup> PHC Transcript 40: 6-16.

A scoping ruling was issued on August 26, 2011. The scoping ruling asked the parties to brief three issues:

- 1) Is the exemption granted under Code § 226, which states that carriers that conduct 98% of their business within a single city and county do not require PSC authority, applicable to any or all of the Applicants in the instant proceeding?
- 2) Did the Applicants have a reasonable basis to believe that the exemption under Code § 226 was applicable to the type of service they provide?
- 3) Does allowing passengers to exit the vehicle and re-board later fall within the parameters of the round-trip authority granted by Applicants' TCP-As?

Briefs in response to the scoping ruling were filed by all parties with the exception of the SFMTA.<sup>11</sup>

## **2. The Applications**

As previously stated, all three Applicants request the authority to transport passengers and their baggage as PSCs. The facts of each Application will be stated individually.

### **2.1 Deluxe Sightseeing Application (A.10-08-025)**

Deluxe Sightseeing proposes to provide regularly scheduled transportation over a fixed route between frequently demanded points of interest in San Francisco and Marin counties. Their customer base will largely be Russian and

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<sup>11</sup> *Scoping Memo Brief of SF Navigatour, Inc., a California Corporation Doing Business as Super Sightseeing Tours (Super Sightseeing Brief), September 20, 2011, Brief of San Francisco Deluxe Sightseeing, LLC in Response to Scoping memo and Ruling of Assigned Commissioner (Deluxe Sightseeing Brief), September 21, 2011, Brief of CitySightseeing Corporation (CitySightseeing Brief), September 21, 2011, Amended Protestant's Response to the Questions posed in Section 4 of the Scoping Memo Dated August 26, 2011, in these Consolidated Proceedings (Open Top Brief), September 22, 2011.*

European sightseeing customers, and individual shoppers using livery services. The service will be operated at 20 minute intervals between the hours of 8:00 a.m. and 6:00 p.m., 365 days a year. They will utilize a fleet of seven 70-passenger “double-decker” buses. In Exhibit D of their Application is a balance sheet, and Exhibit E is a “Pro Forma Projected Annual Income and Expense Statement,” both of which demonstrates Deluxe Sightseeing has adequate financial resources to operate.

Deluxe Sightseeing seeks to establish a ZORF of \$5 above and below the proposed fares of \$20 and under, \$10 above and below the proposed fares greater than \$20 and less than \$40, and \$20 above and below the proposed fares of \$40 and over. Deluxe Sightseeing will compete with other PSCs, public transit, taxicabs, charter vehicles, and private automobiles in its service area. This competitive environment should result in Applicant pricing its services at a reasonable level. Many other PSCs have been granted ZORFs. The requested ZORF is generally consistent with the ZORFs held by other PSCs.

## **2.2 Super Sightseeing Application (A.10-09-005)**

Super Sightseeing proposes to provide regularly scheduled service over a fixed route between points of interest in the counties of San Francisco, Marin, and Alameda. The customer base will largely be sightseeing customers. As listed in Exhibit B of their Application, they will provide departures at 20 minute intervals between 8:20 a.m. and 7:20 p.m.. They will utilize a fleet of six buses, four with a 63-passenger capacity and two with a 34-passenger capacity, as listed in Exhibit D of their Application. Exhibit E is a financial statement that demonstrates Super Sightseeing has adequate financial resources to operate.

Super Sightseeing seeks to establish a ZORF \$15 above and below proposed adult fares of \$30 and \$40, and \$7.50 above and below proposed

children's fares of \$25 and \$30. Super Sightseeing will compete with other PSCs, public transit, taxicabs, charter vehicles, and private automobiles in its service area. This competitive environment should result in Applicant pricing its services at a reasonable level. Many other PSCs have been granted ZORFs. The requested ZORF is generally consistent with the ZORFs held by other PSCs.

### **2.3 CitySightseeing Application (A.10-10-008)**

CitySightseeing proposes to provide regularly scheduled service over a fixed route in San Francisco and Marin Counties. The customer base will largely be sightseeing customers. They will provide 40 bus round-trips per day. They will utilize 15 vehicles, 10 "double-decker" MCW Metrobuses and five open top school buses, holding approximately 72 passengers in each. Exhibit A to their Application is a financial statement that demonstrates CitySightseeing has adequate financial resources to operate.

CitySightseeing seeks to establish a ZORF of \$10 above and below proposed fares of \$12.99, \$14.99, \$15.99, \$22.99, \$27.99, \$29.99, \$39.99, \$49.99, \$54.99, \$73.99 and \$99.99. CitySightseeing will compete with other PSCs, public transit, taxicabs, charter vehicles, and private automobiles in its service area. This competitive environment should result in Applicant pricing its services at a reasonable level. Many other PSCs have been granted ZORFs. The requested ZORF is generally consistent with the ZORFs held by other PSCs.

### **3. Issues before the Public Utilities Commission**

There are four issues that must be addressed in this decision:

- 1) Open Top's protests;
- 2) The exemption found in Code § 226;
- 3) Whether the Applicants had a reasonable belief that the Code § 226 exemption was applicable to "hop-on" and "hop-off" services; and



- 4) Whether “hop-on” and “hop-off” services are allowed under the TCP-As.

### **3.1 Open Top’s Protests**

Open Top has protested all three Applications. Their grounds for protests rely partly on Code § 1032, which presents a variety of evidentiary and statutory standards that Applicants must meet before the Commission will issue a CPCN to operate as a PSC, as well as various policy issues. Open Top raises the same issues for each Applicant in each protest. CitySightseeing, Super Sightseeing and Deluxe Sightseeing are all of the opinion that Open Top’s protests are baseless and without merit. Open Top seeks a rejection of the Applications and/or sanctions.

Open Top claims the Applications fail to meet the evidentiary and statutory standards of Code § 1032. They claim a failure to satisfy Code § 1032(b)(1), which requires each Applicant to establish reasonable fitness and financial responsibility when applying for a CPCN to operate as a PSC. In an Order Instituting Rulemaking issued on December 9, 2010, the Commission stated that “The requirements listed in Section 1032 now mirror those for charter party carriers.”<sup>12</sup> As each of the Applicants currently hold TCP-As and has been operating successfully, we fail to see how they have not met this burden. Nowhere in Code § 1032(b)(1) is the Applicant required to establish fitness and financial responsibility via the Application;<sup>13</sup> this may be done outside of it. Moreover, the Applicants have submitted updated financial statements in their

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<sup>12</sup> *Regarding the Procedures for Processing Applications for Passenger Stage Corporations* (2009) Rulemaking (R.) 09-12-001 at 8.

<sup>13</sup> Code § 1032(b)(1).

Applications, which show their continued financial stability. All of the Applicants thus meet the requirements of Code § 1032(b)(1).

Open Top states that the Applicants are essentially taking business from them at the expense of the public interest.<sup>14</sup> Open Top utilizes *Pacific Towboat and Salvage* (1982), 1982 Cal. PUC LEXIS 1247, to suggest that the Commission must make a finding that there will be sufficient growth to support a new services provider's entry into the market, but this is not an analogous situation. Here, the market already sustains all four companies, while in *Pacific Towboat*, there was a completely new provider entering. Open Top is not "currently the carrier of choice" as they claim.<sup>15</sup> Additionally, the public interest is most clearly served when there is competition.<sup>16</sup>

Section 1032 was revised, in 2006, by Senate Bill (SB) 1840. Prior to the revision, the Commission had to make an affirmative finding of market need and of no harm to existing service providers before a CPCN could be granted. In an Order Instituting Rulemaking (OIR), issued on December 8, 2009, the Commission applied the revised statute. In the OIR the Commission states that "we are no longer required to consider how granting a certificate will impact the

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<sup>14</sup> *Protest of Open Top Sightseeing San Francisco, LLC, a Delaware Limited Liability Company in Opposition to Application of San Francisco Deluxe Sightseeing, LLC, Designated No. A.10-08-025*, October 4, 2010, at 9.

<sup>15</sup> *Protest of Open Top to Deluxe Sightseeing* at 9.

<sup>16</sup> *Application of American Buslines, Inc.* (1980) 3 CPUC 2d 246, 255 (stating that "competitive considerations form a cornerstone for a determination of public convenience and necessity), *Re SuperShuttle of San Francisco, Inc.* (1996) 68 CPUC 2d 254, 262 (stating that there is a "long-held policy to encourage competition in the PSC industry.").

marketplace” with regards to PSC service.<sup>17</sup> We will give no effect to the arguments presented in this part of the Open Top protests.

Open Top argues that the Application lacks sufficient rate information and that the ZORF request should be denied. Open Top asserts that each Applicant must provide statements about the calculation of the operating ratio and that they must meet many requirements to obtain ZORF authority.<sup>18</sup> It is not clear where Open Top is finding these requirements; in various other cases we have approved ZORF authority merely upon a showing of proposed rates and a showing of competitiveness.<sup>19</sup> The Code statute, § 454.2, does not lay out the litany of requirements that Open Top would have the Applicants meet.<sup>20</sup> Each of the Applications state the proposed rates and this Application process on the whole has shown the competitive nature of the “hop-on” and “hop-off” sightseeing market in San Francisco. Open Top’s challenge of ZORF granting is without merit.

It can be argued that Open Top’s protests to the Applicants’ CPCN Applications are part of a larger plan to put all three Applicants out of business, thus obtaining a near monopoly in the “hop-on” and “hop-off” sightseeing market in San Francisco. In the PHC held on July 15, Open Top states that with a finding that the Applicants’ previous activities were illegal, Open Top can then

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<sup>17</sup> *Regarding the Procedures for Processing Applications for Passenger Stage Corporations* (2009) R. 09-12-001 at 7.

<sup>18</sup> Protest of Open Top to Deluxe Sightseeing at 10.

<sup>19</sup> *Application of L.A. Mex Tours, Inc.* (2006) Decision (D.) 06-04-060, *Application of Cojitas Transportation LLC* (2009) D.09-05-034.

<sup>20</sup> Code § 454.2.

sue the Applicants in civil court for damages.<sup>21</sup> This directly conflicts with the Commission's stated policy of favoring competition in all passenger services,<sup>22</sup> and would be a questionable use of judicial resources and time, given, as stated below, the tenuous basis for their protests.

The protests should be rejected.

### **3.2 Code § 226 Exemption**

Pursuant to Code § 226, carriers that conduct 98% of their business within a single city and county do not require PSC authority. If Code § 226 is applicable to any of the Applicants, then that Applicant does not require PSC authority to operate as a "hop-on" and "hop-off" service and thus a CPCN would not be a necessity. Super Sightseeing and Deluxe Sightseeing both argue that they should qualify under this exemption, and therefore would not be required to have previously obtained a CPCN to operate as a PSC.

Code § 226 states that passenger stage corporations include "every corporation or person engaged as a common carrier, for compensation . . . between fixed termini or over a regular route . . . except those, 98 percent or more of whose operations as measured by total route mileage operated, which are exclusively within the limits of a single city or city and county . . ." Open Top argues that by providing "hop-on" and "hop-off" service, in which passengers get on or off at their leisure at different points, the Applicants are providing

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<sup>21</sup> PHC Transcript 33: 7-22.

<sup>22</sup> *Application of American Buslines, Inc.* (1980) 3 CPUC 2d 246, 255 (stating that "competitive considerations form a cornerstone for a determination of public convenience and necessity), *Re SuperShuttle of San Francisco, Inc.* (1996) 68 CPUC 2d 254, 262 (stating that there is a "long-held policy to encourage competition in the PSC industry.").

travel over a regular route and between fixed termini, and thus would qualify as PSCs.

Absent an exemption, PSC classification necessitates obtaining a CPCN to operate.<sup>23</sup> Open Top has argued that Applicants' current activity could be construed as illegal, since they do not currently hold a CPCN. However, should any of the Applicants meet the 98% exemption, then a PSC license would not be necessary. Currently, Super Sightseeing only operates within the City,<sup>24</sup> and thus clearly meets this exemption. Deluxe Sightseeing also meets the exemption, as they only operate to a small tip of Marin County, and have calculated their total mileage outside of the City to be nine miles daily, which is less than two percent of the 500 miles they travel within the City daily.<sup>25</sup> CitySightseeing operates into Marin, Napa and Sonoma Counties,<sup>26</sup> and thus does not meet this exemption. We note the argument presented by counsel for CitySightseeing, that Code § 226 does not in fact apply to the Applicants. CitySightseeing argues that the Commission has disclaimed any desire to regulate sightseeing services under Code § 226.<sup>27</sup> They argue that sightseeing bus services are regulated by the Passenger Charter-Party Carriers Act, Code §§ 5391 and 5374, and not the Public

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<sup>23</sup> Code § 1301(a).

<sup>24</sup> Super Sightseeing at 5.

<sup>25</sup> Deluxe Sightseeing Brief at 6.

<sup>26</sup> *Application of CitySightseeing Corporation for a Certificate of Public Convenience and Necessity to Provide Scheduled Service and to Establish a Zone of Rate Freedom*, October 1, 2010, at 5.

<sup>27</sup> CitySightseeing Brief at 11.

Utilities Act, which contains Code § 226.<sup>28</sup> We decline to address this argument at this time, as it is not necessary to reach a decision.

### **3.3 Is Code § 226 Exemption Applicable to “Hop-on” and “Hop-off” Services?**

Was it reasonable for the Applicants to believe that the exemption for carriers that conduct 98% of their business within a single city and county allows them to provide “hop-on” and “hop-off” services without a CPCN?

It was reasonable for Deluxe Sightseeing and Super Sightseeing to believe the exemption allowed them to operate as “hop-on” and “hop-off” service providers. The plain reading of the statute suggests that if any carrier falls within the exemption, they need not obtain a CPCN to operate as a PSC. “If there is no ambiguity in the language of the statute, then the legislature is presumed to have meant what it said, and the plain meaning of the statute governs.”<sup>29</sup> Even if their “hop-on” and “hop-off” services qualified them as PSCs, the exemption negates the need for a CPCN to operate as one. Deluxe Sightseeing and Super Sightseeing followed the plain meaning of the statute, and therefore their belief was reasonable. Additionally, Deluxe Sightseeing discussed with Commission personnel whether they had the proper certification, and were told they did.<sup>30</sup> The Applicants took reasonable measures to ensure that they fell within the exemption, and nothing suggested that they did not.

Open Top’s challenge to Code § 226 Exemption lacks merit. During the PHC, Open Top made no challenge with regards to the exemption beyond stating

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<sup>28</sup> CitySightseeing Brief at 20.

<sup>29</sup> *Kizer v. Hanna*, 48 Cal. 3d 1, 8 (1989).

<sup>30</sup> Deluxe Sightseeing Brief at 7.

that relying on the “premise that someone on the Commission’s staff told them they could do that . . . is not satisfactory, it is not a sufficient excuse or justification . . .”<sup>31</sup> They made no direct challenge to the actual exemption itself, or the Applicants’ interpretation of it. Open Top spends the entirety of its Brief on this issue arguing evidentiary standards,<sup>32</sup> while ignoring the fact that the plain language of the statute suggests that Deluxe Sightseeing and Super Sightseeing qualify for the exemption. Deluxe Sightseeing and Super Sightseeing thus are not liable for any penalties with regard to prior operations without a CPCN due to their “hop-on” and “hop-off” services while meeting the exemption.

### **3.4 Are “Hop-on” and “Hop-off” services allowed under the TCP-As?**

Does allowing passengers to exit and re-board the vehicle at their leisure fall within the parameters of the TCP-A currently held by CitySightseeing, Deluxe Sightseeing, and Super Sightseeing?

If the TCP-A currently allows for “hop-on” and “hop-off” services, then the PSC authority is unnecessary. Deluxe Sightseeing, Super Sightseeing, and CitySightseeing are all of the view that the TCP-A certificate grants them the ability to provide “hop-on” and “hop-off” services. Open Top has taken the position that it does not provide this ability, and that therefore the Applicants’ activities up until now have been illegal.

Code § 5383 states that TCP-A holders can provide transportation “from any point or points within the state to other points in or out of this state,

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<sup>31</sup> PHC Transcript 31: 21-24.

<sup>32</sup> Open Top Brief at 6.

including, but not limited to, the conduction of round-trip sightseeing tour service.” It is not obvious from the statute that passengers exiting a bus and riding a different one, but back to the original destination point, does not qualify as a round-trip sightseeing tour service. Nowhere in the statute does it state passengers must re-board the same bus,<sup>33</sup> and Open Top provides no justification for its requirement that the tour be in a “continuous loop.”<sup>34</sup> Forcing these companies to wait for passengers to re-board would only exacerbate the traffic issues that the SFMTA have complained about. We conclude that TCP-As allow for the “hop-on” and “hop-off” sightseeing service these companies provide, so long as the service is provided and marketed in a round-trip format.

#### **4. California Environmental Quality Act (CEQA) Analysis**

The CEQA requires the Commission act as the designated lead agency to assess the potential environmental impact of a project in order that adverse effects are avoided, alternatives are investigated, and environmental quality is restored or enhanced to the fullest extent possible. We find that as each company already is operating under TCP-A and would not alter their routes substantially, no additional environmental impact analysis is required.

#### **5. Conclusion**

The protests of Open Top should be denied, as it provides no basis upon which to delay or reject the three pending Applications. Deluxe Sightseeing’s and Super Sightseeing’s current operations qualify them for the Code § 226 exemption, and thus they need not have obtained a PSC prior to this proceeding.

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<sup>33</sup> Code § 5383.

<sup>34</sup> Open Top Brief at 8.



Deluxe Sightseeing and Super Sightseeing also reasonably believed that the exemption allowed them to operate as “hop-on” and “hop-off” service providers. Additionally, all three Applicants’ current TCP-As allows for the round-trip sightseeing service they currently provide. The CPCNs should be granted to Deluxe Sightseeing, Super Sightseeing and CitySightseeing. We decline to levy any penalties or fines against the Applicants for operating “hop-on” and “hop-off” service without a CPCN or PSC license.

## **6. Categorization and Need for Hearings**

In Resolutions ALJ 176-3260, ALJ 176-3261 and ALJ 176-3262, dated September 2, 2010, September 23, 2010 and October 14, 2010 (respectively), the Commission preliminarily categorized these Applications as ratesetting, and preliminarily determined that hearings were not necessary. A protest was filed by Open Top on November 15, 2010. A PHC was held on July 15, 2011, wherein it was determined that the categorization as ratesetting was appropriate. The instant decision has denied the Open Top protests. There is no apparent reason why the Applications should not be granted. Given these developments, a public hearing is not necessary, and it is not necessary to disturb the preliminary determinations.

## **7. Comment on Proposed Decision**

The proposed decision (PD) of Administrative Law Judge (ALJ) W. Anthony Colbert in this matter was mailed to the parties in accordance with Code § 311 and comments were allowed under Rule 14.3 of the Commission’s Rules of Practice and Procedure. Comments were filed by City Sightseeing and Open Top on October 15, 2012. Reply comments were filed on October 19, 2012 by SF Navigatour and on October 22 by City Sightseeing and Open Top.

In its comments Open Top states that the PD now before this Commission is procedurally premature, legally and logically infirm, statutorily deficient, factually inaccurate, and violates fundamental principles of administrative due process and fair play.<sup>35</sup> Despite its vehement objections and obvious disagreement with the PD, Open Top has failed point to relevant factual, legal or technical errors in the PD that would warrant changes as required by Rule 14.3. In their comments and replies City Sightseeing and SF Navigatour support the PD. In its comments City Sightseeing argues that the PD would be enhanced by a finding with regard to communications between the three Applicants and Commission staff on the permissible scope of operations under their TCP authority.<sup>36</sup> We decline to make the requested revision to the PD.

On October 30, 2012, Open Top filed and served a Request for Official Notice. The request asked the Commission to take official notice of the Commission's own records regarding the status of the TCP-A of City Sightseeing. Specifically that the TCP-A was temporally suspended in October due to a missed fee payment. City Sightseeing paid the fee on October 31, 2012, and the TCP-A is currently active and in good standing.

On October 31, 2012, the assigned ALJ scheduled a phone conference with all parties to the consolidated proceeding in order to discuss the issues raised by the request for official notice. On November 5, 2012, the assigned ALJ held the phone conference with the parties. In email communications, between the parties and the assigned ALJ, prior to the phone conference and again during the phone

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<sup>35</sup> Open Top Comments and Objections § I.

<sup>36</sup> Comments of City Sightseeing § II.

conference, Open Top raised allegations concerning the past corporate status of City Sightseeing in Delaware and California.

It is unfortunate that Open Top chose to raise these allegations so late in this proceeding, concerning matters that allegedly occurred well before the close of the record. It would have been infinitely more helpful and procedurally correct if these allegations had been brought to the attention of the assigned ALJ and the parties in a timely manner. The record in the instant proceeding has been closed and the allegations of Open Top, against City Sightseeing, were not filed with the Commission in a timely manner and will not be considered.<sup>37</sup>

## **8. Assignment of Proceeding**

Timothy Alan Simon is the assigned Commissioner and W. Anthony Colbert is the assigned ALJ in this proceeding.

### **Findings of Fact**

1. Deluxe Sightseeing (A.10-08-025) on August 30, 2010, requested the authority to operate as a PSC to transport passengers on a regularly scheduled basis between designated points of interest within the counties of San Francisco and Marin.

2. Super Sightseeing (A.10-09-005) on September 3, 2010, requested the authority to operate as a PSC to transport passengers on a regularly scheduled basis between designated points of interest within the counties of San Francisco, Marin and Alameda.

3. CitySightseeing (A.10-10-008) on October 12, 2010, requested the authority to operate as a PSC to transport passengers on a regularly scheduled basis

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<sup>37</sup> see Rule 14.3.

between designated points of interest within the counties of San Francisco and Marin.

4. Open Top has protested the CPCN Applications of all three companies.
5. All Applicants currently hold and operate under TCP-As.
6. All three Applicants and Open Top currently compete with each other in the “hop-on” and “hop-off” sightseeing market.
7. Super Sightseeing currently operates only within the City.
8. Deluxe Sightseeing currently totals more than 500 miles within the City, and 9 miles daily outside of it.
9. Deluxe Sightseeing and Super Sightseeing conferred with Commission staff on whether a CPCN to operate as a PSC was required in order to permit their current activities, and were told it was not.
10. All Applicants currently provide and market their services as round-trip sightseeing.
11. All Applicants currently allow for customers to exit their original sightseeing vehicle and continue their tour later on a different vehicle bus at their leisure.
12. Deluxe Sightseeing seeks to establish a ZORF of \$5 above and below the proposed fares of \$20 and under, \$10 above and below the proposed fares greater than \$20 and less than \$40, and \$20 above and below the proposed fares of \$40 and over.
13. Super Sightseeing seeks to establish a ZORF \$15 above and below proposed adult fares of \$30 and \$40, and \$7.50 above and below proposed children’s fares of \$25 and \$30.

14. CitySightseeing seeks to establish a ZORF of \$10 above and below proposed fares of \$12.99, \$14.99, \$15.99, \$22.99, \$27.99, \$29.99, \$39.99, \$49.99, \$54.99, \$73.99 and \$99.99.

15. All Applicants will compete with other PSCs, public transit, taxicabs, charter vehicles, and private automobiles in its operations.

16. The City has requested that any CPCN granted in this matter specify that the Applicant comply with applicable local laws governing parking, stopping, passenger loading, solicitation and excessive engine idling.

17. The activities in question will not have a significant effect on the environment.

### **Conclusions of Law**

1. The requirements for obtaining TCP-As are the same as those found in Code § 1032.

2. The Applicants have satisfied the requirements listed in Code § 1032.

3. The financial information presented by the Applicants is adequate to establish ZORFs.

4. Upholding the protests of Open Top does not serve the public interest.

5. Denying the Applicants' CPCN Applications would defy the Commission's stated goal of encouraging competition.

6. The protests filed by Open Top should be denied.

7. Deluxe Sightseeing and Super Sightseeing currently total 98% or more of their total daily mileage within the City.

8. Deluxe Sightseeing and Super Sightseeing both qualify for the exemption listed in Code § 226.

9. Deluxe Sightseeing and Super Sightseeing may otherwise qualify as PSCs, but need not have obtained CPCNs because they qualified for the exemption in Code § 226.

10. The plain meaning of Code § 226 is that any corporation or person that would otherwise be a PSC that meets the criteria of the 98% exemption is not actually a PSC.

11. Deluxe Sightseeing and Super Sightseeing conferred with Commission staff and both reasonably believed the exemption listed in Code § 226 allowed them to provide “hop-on” and “hop-off” privileges.

12. The “hop-on” and “hop-off” aspect of Applicants’ services should not alter the fact that the services they provide are round-trip sightseeing, as allowed under their TCP-A.

13. The Applicants currently provide round-trip services as authorized in their TCP-A.

14. The Applicants provide a diversity of competition in the “hop-on” and “hop-off” sightseeing tour market.

15. The Applicants have previously met the Commission’s standards in obtaining TCP-As and by providing updated financial information.

16. Competition in the marketplace is a public necessity.

17. Public convenience and necessity has been demonstrated and the CPCN Applications of Deluxe Sightseeing, Super Sightseeing, and CitySightseeing should be granted.

18. The information provided in the Applications is sufficient and is consistent with ZORFs we have issued in the past.

19. The market sustains all four companies, and this proceeding has proven the competitive nature of the market.

20. The ZORFs are fair and reasonable.

21. Before any Applicant changes any fares under the ZORF authorized below, the Applicant should give this Commission at least ten-days' notice. The tariff should show the high and low ends of the ZORF and the then currently effective fare between each pair of service points.

22. Any CPCN granted in this matter should specify that the Applicants comply with applicable local laws governing parking, stopping, passenger loading, solicitation and excessive engine idling.

23. The activities in question will not have a significant effect on the environment.

24. A public hearing is not necessary.

## **O R D E R**

### **IT IS ORDERED** that:

1. The protests of Open Top Sightseeing San Francisco, LLC to the applications for Certificates of Public Convenience and Necessity Applications filed by CitySightseeing Corporation, SF Navigatour, Inc., and San Francisco Deluxe Sightseeing, LLC is denied.

2. Certificates of Public Convenience and Necessity are granted to CitySightseeing Corporation, SF Navigatour, Inc., and San Francisco Deluxe Sightseeing, LLC authorizing them to operate as Passenger Stage Corporations, to transport passengers and their baggage over the routes set forth in Appendix PSC-XXXXX subject to the conditions contained in the following paragraphs.

3. The corporate identification numbers assigned to CitySightseeing Corporation, SF Navigatour, Inc., and San Francisco Deluxe Sightseeing, LLC

must be included in the caption of all original filings with this Commission, and in the titles of other pleadings filed in existing cases.

4. CitySightseeing Corporation, SF Navigatour, Inc., and San Francisco Deluxe Sightseeing, LLC shall file a written acceptance of these certificates within 30 days after this decision is effective.

5. CitySightseeing Corporation, SF Navigatour, Inc., and San Francisco Deluxe Sightseeing, LLC must comply with applicable local laws governing parking, stopping, passenger loading, solicitation and excessive engine idling.

6. CitySightseeing Corporation, SF Navigatour, Inc., and San Francisco Deluxe Sightseeing, LLC shall establish the authorized service and file tariffs and timetables within 120 days after this decision is effective.

7. CitySightseeing Corporation, SF Navigatour, Inc., and San Francisco Deluxe Sightseeing, LLC shall file tariffs on or after the effective date of this decision. They shall become effective ten days or more after the effective date of this decision, provided that the Commission and the public are given not less than ten days' notice.

8. CitySightseeing Corporation, SF Navigatour, Inc., and San Francisco Deluxe Sightseeing, LLC shall comply with General Orders Series 101 and 158, and the California Highway Patrol safety rules.

9. CitySightseeing Corporation, SF Navigatour, Inc., and San Francisco Deluxe Sightseeing, LLC shall comply with the controlled substance and alcohol testing certification program pursuant to Pub. Util. Code § 1032.1 and General Order Series 158.

10. CitySightseeing Corporation, SF Navigatour, Inc., and San Francisco Deluxe Sightseeing, LLC shall remit to the Commission the Transportation



Reimbursement Fee required by Pub. Util. Code § 423 when notified by mail to do so.

11. CitySightseeing Corporation, SF Navigatour, Inc., and San Francisco Deluxe Sightseeing, LLC shall comply with Pub. Util. Code §§ 460.7 and 1043, relating to the Workers' Compensation laws of this state.

12. CitySightseeing Corporation, SF Navigatour, Inc., and San Francisco Deluxe Sightseeing, LLC shall enroll all drivers in the pull notice system as required by California Vehicle Code § 1808.1.

13. CitySightseeing Corporation, SF Navigatour, Inc., and San Francisco Deluxe Sightseeing, LLC shall be authorized under Pub. Util. Code § 454.2 to establish a Zone of Rate Freedom (ZORF). Deluxe Sightseeing has authority to establish a ZORF of \$5 above and below the proposed fares of \$20 and under, \$10 above and below the proposed fares greater than \$20 and less than \$40, and \$20 above and below the proposed fares of \$40 and over, as shown in Exhibit B of Application (A.) 10.-08-025. Super Sightseeing has authority to establish a ZORF \$15 above and below proposed adult fares of \$30 and \$40, and \$7.50 above and below proposed children's fares of \$25 and \$30, as shown in Exhibit A of A.10-09-005. CitySightseeing Corporation has authority to establish a ZORF of \$10 above and below proposed fares of \$12.99, \$14.99, \$15.99, \$22.99, \$27.99, \$29.99, \$39.99, \$49.99, \$54.99, \$73.99 and \$99.99, as shown at 6 and 7 of A.10-10-008.

14. CitySightseeing Corporation, SF Navigatour, Inc., and San Francisco Deluxe Sightseeing, LLC shall file zone of rate freedom tariffs in accordance with the Application on not less than ten-days' notice to the Commission and to the public. The ZORFs shall expire unless exercised within 120 days after the effective date of this decision.

15. CitySightseeing Corporation, SF Navigatour, Inc., and San Francisco Deluxe Sightseeing, LLC may make changes within the Zone of Rate Freedom by filing amended tariffs on not less than ten-days' notice to the Commission and to the public. The tariff shall include the authorized maximum and minimum fares and the fare to be charged between each pair of service points.

16. CitySightseeing Corporation, SF Navigatour, Inc., and San Francisco Deluxe Sightseeing, LLC shall are authorized to begin operations as a Passenger Stage Corporation on the date that the Consumer Protection and Safety Division mails a notice to Applicant that its evidence of insurance and other documents required by Ordering Paragraph 2, herein, have been filed with the Commission and that the California Highway Patrol has approved the use of Applicant's vehicles for service.

17. Before beginning service to any airport, CitySightseeing Corporation, SF Navigatour, Inc., and San Francisco Deluxe Sightseeing, LLC shall notify the airport's governing body. Applicants shall not operate into or on airport property unless such operations are authorized by the airport's governing body.

18. The Certificates of Public Convenience and Necessity to operate as PSC-XXXX, granted herein, expires unless exercised within 120 days after the effective date of this decision.

19. The Applications of CitySightseeing Corporation, SF Navigatour, Inc., and San Francisco Deluxe Sightseeing, LLC are granted as set forth above.

20. Application (A.) 10-08-025, A.10-09-005 and A.10-10-008 are closed.

This order is effective today.

Dated \_\_\_\_\_, at San Francisco, California.